

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

27027

FILE: B-213225

DATE: December 14, 1983

MATTER OF: Hero, Inc.

DIGEST:

1. Procuring agency generally must give bidders sufficient details in solicitation to enable them to compete intelligently and on relatively equal basis; specifications must be unambiguous and describe agency's minimum needs accurately. However, when precise estimates of work to be performed cannot be made, solicitation is sufficient if it places bidders on notice and permits them to use business judgment in setting prices to cover risk of being asked to provide greater amount or different type of services than indicated.
2. Where 11 firms submit bids in response to allegedly vague solicitation and four bidders specifically state that they had no difficulty in preparing fixed-price bids, GAO cannot conclude that specifications inhibited competition or prevented bidders from preparing bids properly.
3. Allegation that unrealistically low bid is due to failure to understand what may be required under contract involves bidder responsibility and, if agency makes affirmative determination, GAO will not generally review it.
4. Where agency solicits bids for a requirements contract on the basis of estimated quantity, estimate in solicitation should be based on the best information available and present a reasonably accurate representation of the agency's anticipated needs. Protest that providing estimated total square footage of major floor finishing required, instead of estimate of square footage of each of three different types of floor finishing to be performed is defective, is denied where protester has not established that the more general estimate is not based on best information available.

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5. Where one item under bid schedule, which requires separate bid price, is undisputedly construction work, agency properly included in solicitation Davis-Bacon Act wage provisions which are applicable to construction work.

Hero, Inc. (Hero), protests any award under invitation for bids (IFB) No. F49642-83-B-1018, for comprehensive maintenance and repair of family housing issued by the Department of the Air Force (Air Force). Hero contends that the IFB is defective because it fails to state estimated quantities for two solicited items in contravention of applicable regulation and because the IFB improperly contains a Davis-Bacon Act wage determination. Hero requests cancellation of the IFB.

We find the protest without merit.

Since January 1, 1981, Hero has performed under an Air Force contract for the maintenance and repair of family housing units at Andrews Air Force Base. On August 22, 1983, the Air Force issued the IFB under protest. A site visit and prebid conference was held on September 1, 1983.

On September 13, 1983, Hero sought injunctive relief from the United States Claims Court. Hero argued that the IFB was defective for the same reasons discussed in this decision and now before the district court. The United States Claims Court dismissed Hero's complaint because at the time it was not a bidder under the IFB at issue and, in any event, even as a bidder, the firm would not be entitled to equitable relief. On September 30, 1983, Hero filed a protest with our Office and on October 14, 1983, filed for injunctive relief with the United States District Court for the District of Columbia under Civil Action No. 83-3032. The court concluded it had jurisdiction, issued a preliminary injunction and requested our opinion on Hero's protest.

The first ground of protest concerns item 1 of the IFB which requires the contractor to furnish all labor, transportation, equipment, and supervision necessary for the maintenance of 2,084 specified family housing units. The IFB solicits a firm, fixed price for this item. Hero argues that this item is a fixed-price, requirements contract with an indefinite scope of work and that the Air Force is required to state under Defense Acquisition Regulation (DAR) § 3-409.2 (1976 ed.) estimated quantities for major items of work under the item. For example, item 1 requires repair or replacement of fencing, walls, floor and bathrooms, each of

which would cost a different amount to accomplish. According to Hero, the best available information consistent with the DAR provision is the estimated quantities or historical information for these major items of work. Hero asserts that the Air Force should provide estimates of the number and type of items needing repair or replacement and, without this information, bidders will not bid on a common basis.

The Air Force argues that the information it provided under the IFB permits informed bidding under item 1. The Air Force states that the IFB contains the estimated number of service calls listed by general maintenance, appliance repair, and air conditioning/heating repair. Also, the IFB contains the average number of vacant housing units by month, type of housing units to be serviced, including housing unit number, type of construction, gross square feet, date constructed, type of equipment in housing and floor plans, and unique features and problems. Finally, the IFB contains standards for types of tasks defining the quality of maintenance and repair work to be performed under this line item. The Air Force asserts that this information is sufficient for bidders to intelligently estimate the size and composition of the staff needed to meet item 1. Moreover, only Hero, the incumbent, has objected to this item, and the Air Force advises that it deliberately determined not to convert item 1 into a requirements contract because that approach would create a costly and unnecessary contract administration burden.

We find Hero's argument that the item is a requirements-type contract because of the indefinite scope of work and, therefore, DAR § 3-409.2(a) requires the Air Force to inform bidders of the estimated quantities for the major task areas to be without merit.

As a general rule, a procuring agency must give bidders sufficient detail in the IFB to enable them to compete intelligently and on a relatively equal basis. Telephonics Corporation, B-194110, January 9, 1980, 80-1 CPD 25. Specifications must be free from ambiguity, M. J. Rudolph Corporation, B-196159, January 31, 1980, 80-1 CPD 84, and must describe the minimum needs of the procuring activity accurately. Gibson & Cushman Dredging Corporation, B-194902, February 12, 1980, 80-1 CPD 122. There is no legal requirement that competition be based on plans and specifications which state the work in detail so as to completely eliminate the possibility that the successful contractor will encounter conditions or be required to perform work other than that specified. We have stated that such perfection, while desirable, is manifestly impracticable in some procurements,

41 Comp. Gen. 484 at 488 (1962), and that the mere presence of a risk factor does not make a solicitation improper. Applied Devices Corporation, B-199371, February 4, 1981, 81-1 CPD 65.

Under these standards, we find the information provided for item 1 to be adequate to prepare a bid. While, as Hero states, it might have been helpful to bidders if the Air Force had provided the service orders in more detailed task categories, there is no requirement that the agency do so. Furthermore, the information Hero wants is not the only factor which may determine current needs. For example, if bidders were informed that 40 percent of service calls last year involved plumbing type maintenance, there is no assurance that this pattern would necessarily repeat itself this year; rather, there could be an inverse relationship because a high incidence of plumbing repair in the previous year might result in diminution of existing problems and, therefore, less repair or replacement the following year. Similarly, if external wall and roof repairs were not a substantial percentage of work last year, weather conditions this year could result in more roof and wall repairs. Thus, the historical data Hero seeks would not necessarily provide a more accurate basis for bidders to prepare their bids.

In light of this, we find the Air Force decision only to provide the prior year's total of service calls and information concerning the building structures not legally objectionable.

For the reasons discussed immediately above, even if we assumed that item 1 was a requirements contract, the protester has not shown that the information provided by the Air Force did not constitute the best available information as required under the DAR § 3-409.2(a).

We note that in Klein-Sieb Advertising and Public Relations, Inc. (Klein-Sieb), B-200399, September 28, 1981, 81-2 CPD 251, we addressed issues similar to the ones raised here. Klein-Sieb, the incumbent under that procurement, was concerned that firms which had not performed the contract would be unaware of the great differences in the amount and type of work which the agency required under previous contracts and that bids would be unrealistically low. Klein-Sieb argued, as does Hero, that the agency possessed detailed figures based on the prior contract experience which the agency had a duty to disclose to all bidders. Without such disclosure, the incumbent argued, it would be prejudiced by offering what it believed, on the basis of

past experience, was a reasonable price for the services it would be expected to provide.

In Klein-Seib, we found it significant that other offerors had submitted offers without protest, and several had specifically commented to this Office that they found the statement of work adequate for preparation of proposals on a fixed-price basis. Similarly, here four bidders have indicated specifically to this Office no problems with the IFB, and 11 bids have been received.

We also note that the prior IFB under which Hero was awarded the current contract contained the same schedule format, that is, a fixed price for maintenance services. Although the scope of work has been expanded under the instant IFB, the solicitation approach has been viable in the past and apparently resulted in adequate competition and award.

The second protest allegation concerns item 4, which is a requirements item that solicits a price per square foot for providing major floor refinishing. The bid schedule states estimated quantities in totals of 45,000 square feet for occupied units and 65,000 for unoccupied units and also indicates that in the previous year 91 units, totaling 87,252 square feet, were serviced. Hero does not challenge the accuracy of this information, but contends that this information does not comply with DAR § 3-409.2 that a requirements item state the best available estimated quantities. The protester argues that the best available estimate requires a breakdown by the three types of floors involved in this requirement--wood floors, resilient floors, and linoleum floors. Hero states that, as the incumbent contractor, it has furnished the Air Force with the previous year's breakdown as to the type of floor refinished, and such information should be disclosed to the bidders.

The Air Force points out that the DAR provision requires the best available estimated quantities, which, in its view, it has provided, and that additional specificity regarding these estimates cannot be supported by information available to the Air Force, and the information is not required to permit bidders to compete on a common basis.

We deny this protest issue.

DAR § 3-409.2(a) provides that when an agency solicits bids for a requirements contract on the basis of estimated

quantities, the estimate "should be as realistic as possible." We therefore have held that the estimate stated in the IFB must be based on the best information available and present a reasonably accurate representation of the agency's anticipated actual needs. Space Service International Corporation, B-207888.4, .5, .6, .7, December 13, 1982, 82-2 CPD 525. There is no requirement that the estimate be absolutely correct. Since the protester bears the burden of proof, we normally will not sustain a challenge to an agency's estimate unless it is shown that the estimate misrepresents anticipated actual requirements, is not based on the best information available, or resulted from bad faith or fraud. Space Service, supra.

Thus, the issue here is whether the estimate is based on the best information available. In our view, the protester has not established that the estimate is not based on the best information available to the Air Force.

The Air Force decided to solicit on the basis of an estimate of the total quantity of floor finishing per square foot and advised bidders of the total estimated need regardless of floor type for fiscal year 1984 and further provided the previous year's total. Hero does not challenge the accuracy of the total estimate, but argues that further detail is warranted. While Hero argues that as incumbent contractor it provided a breakdown of the type and quantity of floor finishing performed the previous year, the Air Force states that this historical data was not the best estimate of future needs. The Air Force indicates that the prior year's information does not provide a reliable indication of this year's needs and that the Air Force's estimated total provides a more accurate projection of its requirement. In this regard, the protester has not provided any evidence that last year's experience is a reliable indication of this year's requirement with respect to the types of floors that will require floor finishing. Under these circumstances, we find that the agency did not abuse its discretion in using an estimate rather than historical data in order to determine its requirements.

With regard to both items 1 and 4, Hero's implied allegation that any bidder who submitted an unrealistically low price does not understand what is required under the contract concerns the bidder's ability to perform and, thus, is a matter of responsibility. Before awarding a contract to any firm, the Air Force must find that it is a responsible concern. DAR § 1-902 (1976 ed.). Our Office does not

review affirmative determinations of responsibility except in circumstances not present here. See Klein-Sieb Advertising and Public Relations, Inc., supra.

Hero's other objection to the IFB is that the contract, if awarded, will contain two wage rate determinations. Under the IFB, the Service Contract Act, 41 U.S.C. § 351, et seq. (1976), is applicable to item 1 and the Davis-Bacon Act, 40 U.S.C. § 276a (1976), will cover item 4.

Hero asserts that the use of two different wage determinations under the contract will obligate the contractor to pay a minimum wage of at least \$9.66 per hour for carpenters performing work under item 1, while the minimum wage for carpenters working under item 4 will be only \$6.32 per hour. Hero argues "that the inclusion of these varying wage rates for the same class of employee working on the same project creates . . . confusion as to the price to be bid," and that "[i]t would be virtually impossible to hire an employee at two different wage rates depending on what the employee is doing at a particular time on a particular day."

Hero does not deny that some of the work under the IFB could be classified as construction work and subject to the Davis-Bacon Act. Hero asserts, however, that under DAR § 12-106.2, the Davis-Bacon Act wage determination is unnecessary and should have been excluded from this IFB.

DAR § 12-106.2 states that a contract for construction work is exempt from the need to include appropriate Davis-Bacon Act clauses in the IFB, when it is to be performed in support of nonconstruction work and, in the circumstances of the particular case, the construction work is so merged with the nonconstruction work or so fragmented in terms of the locations or time spans in which it is to be performed that it cannot be segregated as a separate contractual requirement for construction.

Our Office has concluded that the responsibility for determining whether Davis-Bacon Act provisions should be included in a particular contract, as in the case of other appropriate contract provisions, rests primarily with the contracting agencies which must award, administer and enforce the contract. Consequently, our Office will not disturb a good-faith determination by a contracting officer that a contract should be either for construction or supply. Abbott Power Corporation, B-190067, December 6, 1977, 77-2 CPD 434; 44 Comp. Gen. 498 (1965).

The Air Force states that item 4 covering floor finishing, is work requirements classified as construction work by the Department of Labor (DOL), and that DOL confirmed this during the course of the preparation of the IFB. Hero does not deny that some of the IFB could be classified as construction work, but argues that it cannot be clearly separated as a practical matter from the other work.

In our view, the Air Force has not acted improperly in applying the Davis-Bacon Act provisions to item 4. The work is separately identified as major floor finishing as a separately bid item with its own specification. As such, the Air Force properly followed the DAR in including the Davis-Bacon provisions. Bidders responding to item 4 are on notice that they must pay salaries in accordance with the Davis-Bacon Act wage determination and must bid accordingly.

Furthermore, we reject Hero's contention that paying for minor floor finishing work under a Service Contract Act wage rate under item 1 and at a different wage rate under item 4 for major floor refinishing creates confusion as to how to bid. We note that Hero asserts by affidavit that it is impossible to hire construction workers at different wage rates and thus bidders will have to pay at the higher of the two wage rates. Assuming the protester is correct in this regard, bidders should know that they will be obligated to pay workers at the higher rate and, therefore, bidders should be able to calculate wage requirements under the IFB.

As noted above, it is our view that the protest is without merit.

Milton J. Fowler
for Comptroller General
of the United States